

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL
COALITION, WEST VIRGINIA
HIGHLANDS CONSERVANCY,
WEST VIRGINIA RIVERS COALITION,
and SIERRA CLUB,**

Plaintiffs,

v.

CIVIL ACTION NO. 3:18-00077

SOUTHEASTERN LAND, LLC,

Defendant.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a citizen suit for declaratory and injunctive relief against Defendant Southeastern Land, LLC (“Southeastern”) for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereafter the Clean Water Act (“CWA”)), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (hereafter “SMCRA”), at the Peachorchard Surface Mine No. 5 in Nicholas County, West Virginia and the Ike Fork No. 1 Surface Mine in Clay and Nicholas Counties, West Virginia.

2. As detailed below, Plaintiffs allege that Southeastern has discharged and continues to discharge pollutants into waters of the United States in violation of Sections 301 and 401 of the CWA, 33 U.S.C. §§ 1311, 1341, and the conditions and limitations of West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit Nos. WV1017951 and WV1017969 issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

3. Plaintiffs further allege that Southeastern’s discharges of pollutants into waters

adjacent to the Peachorchard Surface Mine No. 5 and the Ike Fork No. 1 Surface Mine Surface Mine violate the performance standards under SMCRA and the terms and conditions of West Virginia surface mining permit Nos. S201398 and S201298.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (CWA citizens' suit provision), and 30 U.S.C. § 1270 (SMCRA citizens' suit provision).

5. On November 20, 2017, Plaintiffs gave notice of the violations and their intent to file suit in two letters sent to the Defendant, the United States Environmental Protection Agency ("EPA"), the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), and the West Virginia Department of Environmental Protection ("WVDEP"), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270(b)(1)(A).

6. More than sixty days have passed since the notice letters were sent. EPA, OSMRE, and/or WVDEP have not commenced or diligently prosecuted a civil or criminal action to redress the violations. Moreover, neither EPA nor WVDEP commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), or a comparable state law to redress the violations prior to the issuance of the November 20, 2017 notice letters.

7. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the CWA violations are located in this District, and pursuant to 30 U.S.C. § 1270(c) because the coal mining operations complained of are located in this District.

PARTIES

8. Southeastern is a Kentucky Limited Liability Company engaged in the business of

mining coal. Since July 19, 2016, Southeastern has owned and operated the Peachorchard Surface Mine No. 5 and the Ike Fork No. 1 Surface Mine. Southeastern holds the permits for the Peachorchard Surface Mine No. 5 in its own name. Southeastern operates under the permits for the Ike Fork No. 1 Surface Mine, which are held in the name of Fola Coal Company, LLC (Fola). On March 16, 2017, Southeastern applied to WVDEP to transfer WV/NPDES Permit No. WV1017951 for the Ike Fork No. 1 Surface Mine from Fola to Southeastern, and that application is currently awaiting final approval by WVDEP. On February 27, 2017, Southeastern applied to WVDEP to transfer West Virginia Surface Mining Permit S201298 for the Ike Fork Surface Mine No. 1 from Fola to Southeastern, and that application is currently awaiting final approval by WVDEP. Upon information and belief, while the permits are held in the name of Fola, Southeastern has been the mine operator, and controlled discharges from the Ike Fork Surface Mine since the day of, or some time before, the filing of the original complaint.

9. Southeastern is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and Section 701(19) of SMCRA, 30 U.S.C. § 1291(19).

10. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

11. Plaintiff West Virginia Highlands Conservancy, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 2,000 members. It works for the

conservation and wise management of West Virginia's natural resources.

12. Plaintiff West Virginia Rivers Coalition makes its mission the conservation and restoration of West Virginia's exceptional rivers and streams. It not only seeks preservation of high quality waters, but also the improvement of waters that should be of high quality. It has approximately 2,500 members.

13. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 740,000 members and supporters nationwide including approximately 2,400 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting wild places of the Earth; to practicing and promoting the responsible use of Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface water in West Virginia.

14. Plaintiffs have members including Cindy Rank, James Tawney and Angie Rosser, who use, enjoy, and benefit from the water quality in tributaries and downstream portions of the Elk and Gauley Rivers. The Peachorchard mine discharges into Peachorchard Branch of Twentymile Creek, which is a tributary of the Gauley River. The Ike Fork mine discharges into Sycamore Run and Lily Fork, which flow into Buffalo Creek, a tributary of the Elk River.

15. Plaintiffs' members would like to recreate in areas downstream from the portion of the streams into which the Peachorchard Surface Mine No. 5 and the Ike Fork No. 1 Surface Mine discharge pollutants harmful to aquatic life, including total dissolved, conductivity and sulfate. Excessive amounts of these pollutants degrade the water quality of the Elk River and its tributaries, make the water aesthetically unpleasant and environmentally undesirable and impair

its suitability for aquatic life. Because of this pollution, Plaintiffs' members refrain from and/or restrict their usage of tributaries of the Elk River and Gauley River and associated natural resources. As a result, the environmental, health, aesthetic, and recreational interests of these members are adversely affected by Southeastern's excessive discharges of these and other pollutants into tributaries of the Elk River from the Peachorchard Surface Mine No. 5 and the Ike Fork No. 1 Surface Mine in violation of their WV/NPDES permits and their SMCRA permits. If Southeastern's unlawful discharges ceased, the harm to the interests of Plaintiffs' members would be redressed. An injunction would redress Plaintiffs' members' injuries by preventing future violations of the limits in Southeastern's permits.

16. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5) and SMCRA, 30 U.S.C. § 1291(19).

STATUTORY AND REGULATORY FRAMEWORK

17. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a NPDES permit issued by EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue a NPDES Permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

19. Section 303(a) of the CWA, 33 U.S.C. § 1313(a) requires that states adopt ambient water quality standards and establish water quality criteria for particular water bodies

that will protect designated uses of the water.

20. The Administrator of EPA authorized WVDEP, pursuant to Section 402(a)(2) of the Act, 33 U.S.C. § 1342(a)(2), to issue NPDES permits on May 10, 1982. 47 Fed. Reg. 22363. The applicable West Virginia law for issuing NPDES permits is the Water Pollution Control Act (“WPCA”), W.Va. Code § 22-11-1, et seq.

21. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person. . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

22. Section 505(f) of the CWA, 33 U.S.C. § 1365(f), defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision in Section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and “a permit or condition thereof issued” under Section 402 of the CWA, 33 U.S.C. § 1342.

23. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA.

24. Under Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

25. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from OSMRE or from an approved state regulatory authority.

26. At all relevant times, the State of West Virginia has administered an approved surface mining regulatory program under SMCRA. *See* 30 C.F.R. § 948.10.

27. Among the performance standards mandated by SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) is that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 30 C.F.R. §§ 816.42 and 817.42; 38 C.S.R. § 2-14.5.b.

28. The performance standards further require that “[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside the permit area.” 38 C.S.R. § 2-14.5. At a minimum, “material damage” includes violations of water quality standards.

29. The legislative rules promulgated under WVSCMRA provide that, as a general condition of all surface mining permits issued under the WVSCMRA, the permittee must comply with all applicable performance standards. 38 C.S.R. § 2-3.33.c.

30. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person adversely affected to bring an action in federal court to compel compliance with SMCRA against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to [SMCRA].”

31. Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), authorizes the Court to award the costs of litigation, including attorney fees and expert witness fees, “to any party, whenever the court determines such an award is appropriate.”

32. WVDEP is the agency in the State of West Virginia that administers the State’s CWA and SMCRA programs and issues WV/NPDES Permits and WVSCMRA Permits.

FACTS

33. Southeastern’s mining activities at the Peachorchard Surface Mine No. 5 are regulated under West Virginia Surface Mining Permit S201398. That Permit was renewed in

2014 and transferred from Fola to Southeastern on August 23, 2017.

34. Southeastern's mining activities at its Ike Fork No. 1 Surface Mine are regulated under West Virginia Surface Mining Permit S201298. That permit was renewed in 2017 and remains in effect. Upon information and belief, while the permit is held in the name of Fola Coal Company, Southeastern has operated under the permit and controlled discharges from the site since the day of, or some time before, the filing of this action.

35. Southeastern's water discharge activities at its Peachorchard Surface Mine No. 5 are regulated under WV/NPDES Permit No. WV1017969. That permit was reissued in 2014 and transferred from Fola to Southeastern on October 2, 2017.

36. Southeastern's water discharge activities at its Ike Fork No. 1 Surface Mine are regulated under WV/NPDES Permit No. WV1017951. That permit was reissued in 2014 and remains in effect. Upon information and belief, while that permit is held in the name of Fola Coal Company, Southeastern has been in control of mining operations since the day of, or some time before, the filing of this action.

37. Part C of WV/NPDES Permit Nos. WV1017969 and WV1017951 incorporate by reference 47 C.S.R. § 30-5.1.f, which provides that: "The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2." WVDEP's narrative water quality standards prohibit discharges of "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or that cause "significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

Violations of Water Quality Standards at Southeastern's Peachorchard Surface Mine No. 5

38. Southeastern's Permit No. WV1017969 regulates discharges from Outlets 001 and 004 of Peachorchard Surface Mine No. 5, which discharge into Peachorchard Branch of Twentymile Creek.

39. In the fall of 1999 and spring of 2000, prior to mining activities in the Peachorchard Branch watershed, Fola, the prior permit holder, sampled the baseline water quality and biological integrity in the streams in that watershed at Station numbers Fola-39 through Fola-47 and found the following:

Table A—Pre-mining Sampling					
Station	Conductivity 11/18/99	Conductivity 3/8/00	Sulfate 11/18/99	Sulfate 3/8/00	WVSCI
39	279	165	96	48	81
40	48	79	15	23	76
41	Dry	Dry	Dry	Dry	Dry
42	72	73	17	19	81
43	131	100	30	29	85
44	150	115	36	27	97
45	72	99	13	7	87
46	72	50	9	9	88
47	120	47	7	6	78

Thus, all of these stations had low conductivity, low sulfate, and high West Virginia Stream Condition Index (WVSCI) scores.

40. Fola also reported that the baseline average surface water quality at three stations in this watershed (PODN, POUP, and DNPB) was 150-315 mhos for conductivity and 25-204 ppm for sulfate. According to WVDEP's April 8, 2004 Cumulative Hydrologic Impact Assessment for S201398, PODN is the threshold monitoring point for all mining activities in Peachorchard Branch, and DNPB and POUP were located upstream and downstream of six of the proposed NPDES outlets for this mine. The coordinates for PODN (38° 20' 02", 81° 03' 57")

are very close to those for BASDPB4 (38° 19'59.4", 81° 03' 43.3").

41. Southeastern's discharge monitoring reports since July 2016 show that it discharged the following maximum amounts of specific conductance (Cond in $\mu\text{S}/\text{cm}$), pH (in SU), calcium (Ca in mg/l), magnesium (Mg in mg/l), sodium (Na in mg/l), potassium (K in mg/l), sulfates (SO_4 in mg/l) and total dissolved solids (TDS in mg/l) from Outlet 001:

Table B—Outlet 001								
	Cond	pH	Ca	Mg	Na	K	SO_4	TDS
Jul-16	2430	7.57	199	145	152	12.2	1360	2010
Aug-16	2000	7.76	160	121	119	10.8	1030	1410
Sep-16	2790	8.17	233	181	241	14.1	1700	2450
Oct-16	2920	7.68	233	180	225	14.5	1680	2490
Nov-16	2750	7.7	209	168	211	14	2380	2250
Dec-16	2880	7.87	221	191	247	14.6	3360	2530
Jan-17	2470	7.65	187	138	181	11.8	1370	1930
Feb-17	2510	7.72	210	168	178	12.4	1440	2110
Mar-17	2250	7.24	229	160	82.3	11	1340	1920
Apr-17	2160	7.4	215	154	56.6	10.6	1350	1810
May-17	2270	7.6	225	157	55.9	10.6	1370	2040
Jun-17	2650	7.73	252	180	68.1	13.5	1620	2850
Jul-17	2570	7.78	269	198	68.9	14.3	1770	2330
Aug-17	2430	7.76	292	194	54.5	14.7	1540	2270
Sep-17	2350	7.75	307	208	49.6	15.4	1540	2300
Oct-17	2270	7.57	257	163	44.2	12.7	2870	2090
Nov-17	2180	7.93	318	210	46.8	14.9	1860	2490
Dec-17	2590	7.88	313	195	39.9	13.7	1540	2360

42. Southeastern's discharge monitoring reports since July 2016 show that it discharged the following maximum amounts of the same pollutants from Outlet 004:

Table C—Outlet 004								
	Cond	pH	Ca	Mg	Na	K	SO_4	TDS
Jul-16	2220	7.29	174	142	137	11.4	3000	1910
Aug-16	2380	7.46	134	110	113	8.44	1310	1870
Sep-16	2670	7.32	189	47.7	427	13.1	1500	2040
Oct-16	2500	7.9	175	93.1	284	12.3	1920	1890
Nov-16	2170	7.73	118	123	199	10.7	1150	1600
Dec-16	1940	7.89	129	132	144	10.2	1030	1570

Jan-17	2270	7.27	153	115	186	10.1	1260	1770
Feb-17	2760	7.71	171	102	348	12.8	2670	2360
Mar-17	2550	8.04	164	163	175	10.9	2250	2130
Apr-17	2690	6.9	129	100	231	9.98	1490	2090
May-17	2560	7.48	156	124	269	11.4	1480	2190
Jun-17	3280	7.7	160	28.5	545	11.6	1520	2470
Jul-17	3250	7.38	181	50.8	552	11.9	2440	2420
Aug-17	2920	7.51	178	53	536	11.6	1500	2190
Sep-17	3280	7.4	188	67.4	689	13.3	1970	2600
Oct-17	2620	7.57	135	68.4	389	9.91	2620	2080
Nov-17	2440	7.24	171	50.2	527	11.4	1800	2400
Dec-17	2810	7.06	130	45.2	430	9.53	1430	2020

43. In 2012, 2015, 2016, and 2017, Fola and/or Southeastern's consultants conducted benthic macroinvertebrate, instream habitat, and water quality sampling at three biological assessment stations (BAS) at the Peachorchard Surface Mine No. 5. Station BASDUTPB3 was located in an unnamed tributary of Peachorchard Branch, upstream of its confluence with Peachorchard Branch. Station BASDP84 was located in Peachorchard Branch, downstream of Outlets 001 and 004. Station BASDPB was located in Peachorchard Branch, downstream of its confluence with the unnamed tributary of Peachorchard Branch. Station BASDUTPB3 was the upstream station least affected by mining activities, Station BASDP84 was downstream of and closest to the two mine outlets, and Station BASDPB was further downstream from those outlets.

44. The consultants reported the following results from their sampling:

Table D—Post-mining Sampling				
Station	Date	Habitat Score	WVSCI Score	Conductivity
BASDUTPB3	4/23/12	151	37.6	872
	4/21/15	146	50.7	365
	4/25/16	147	70.2	423
	4/25/17	155	75.1	350
BASDPB4	4/23/12	137	34.6	999
	4/21/15	137	62.9	1090
	4/25/16	138	50.9	2020
	4/25/17	143	59.8	2043
BASDPB	4/23/12	172	72.6	923

	4/21/15	147	74.5	1140
	4/25/16	144	55.0	1628
	4/25/17	140	62.4	1203

45. According to WVDEP’s draft 2016 Section 303(d) List, streams are biologically impaired when their WVSCI scores are below 72. Most of the reported scores were below that threshold. The habitat scores at all three stations were in the sub-optimal range and all stations “demonstrate[d] adequate epifaunal substrate and an abundance of riffle suitable for benthic macroinvertebrate colonization and potential fish spawning.” 2017 Report at 7.

46. High levels of conductivity, dissolved solids, alkalinity, and ionic chemicals (including sulfates, bicarbonate, magnesium and calcium) are a primary cause of water quality impairments downstream from mine discharges.

47. In 2011, EPA scientists summarized the existing science connecting conductivity and biological degradation in an EPA report entitled, “A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams.” That report, which was peer-reviewed by scientists on EPA’s Science Advisory Board, used EPA’s standard method for deriving water quality criteria to derive a conductivity benchmark of 300 $\mu\text{S}/\text{cm}$. *Id.* at xiv-xv. According to the species sensitivity distribution in the benchmark, on average, five percent of species are lost when conductivity rises to 295 $\mu\text{S}/\text{cm}$, over 50% are lost at 2000 $\mu\text{S}/\text{cm}$, and close to 60% are lost at 3000 $\mu\text{S}/\text{cm}$. *Id.* at 18. A statistical analysis included in the benchmark determined that at a conductivity level of 300 $\mu\text{S}/\text{cm}$ a stream has a 59% likelihood of being impaired and at 500 $\mu\text{S}/\text{cm}$ a stream has a 72% likelihood of being impaired. *Id.* at A-36.

48. The EPA Benchmark report is supported by more recent peer-reviewed studies. Cormier, et al., Derivation of a Benchmark for Freshwater Ionic Strength, Environmental Toxicology and Chemistry, 32(2): 263-271 (2013), and references cited therein; Bernhardt, et al., “How Many Mountains Can We Mine? Assessing the Regional Degradation of Central Appalachian Rivers by

Surface Coal Mining,” Environmental Science & Technology, 46 (15), pp. 8115–8122 (2012). The latter study’s authors found that:

The extent of surface mining within catchments is highly correlated with the ionic strength and sulfate concentrations of receiving streams. Generalized additive models were used to estimate the amount of watershed mining, stream ionic strength, or sulfate concentrations beyond which biological impairment (based on state biocriteria) is likely. We find this threshold is reached once surface coal mines occupy >5.4% of their contributing watershed area, ionic strength exceeds 308 $\mu\text{S cm}^{-1}$, or sulfate concentrations exceed 50 mg/L.

49. A 2016 study by Clements and Kotalik using simulated mine effluents in an experimental stream under controlled conditions measured the same adverse effects on aquatic organisms at conductivity levels of 300 $\mu\text{S/cm}$ and lower.

50. Scientific studies show that the ions found coming out of Outlets 001 and 004 are consistent with those associated with surface coal mining pollution in this region. Those studies show that the ionic mixture of calcium, magnesium, sulfate, and bicarbonate in alkaline mine water causes the loss of aquatic macroinvertebrates in Appalachian areas where surface coal mining is prevalent; it is the mixture of ions that causes the biological impairment. Scientific studies also show that this mixture also has significant adverse effects on fish assemblages and has toxic effects on aquatic life, including mayflies.

51. Southeastern’s Peachorchard Surface Mine No. 5 is a major development activity covering a majority of the area in the Peachorchard Branch watershed. The high mining intensity in that watershed and Southeastern’s related discharges of ionic pollutants, measured as conductivity, from Outlets 001 and 004 are causing or materially contributing to violations of water quality standards in Peachorchard Branch.

Violations of Water Quality Standards at Southeastern’s Ike Fork No. 1 Surface Mine

52. WV/NPDES Permit No. WV1017951 regulates discharges from Outlet 002 of Ike

Fork No. 1 Surface Mine, which discharges into Sycamore Run, which flows into Lily Fork, then into Buffalo Creek, and then into the Elk River.

53. WVDEP's March 23, 2001 Cumulative Hydrologic Impact Assessment (CHIA) for the Ike Fork No. 1 Surface Mine stated that in 1999, prior the start of that mine, the pH in Lilly Fork downstream from Sycamore Run ranged from 6.00 to 7.20, total dissolved solids averaged 210.71 mg/l, and sulfates averaged 127.14 mg/l. Between 1989 and 1999, prior to mining, the pH in the main stem of Sycamore Run directly above its confluence with Lilly Fork ranged from 4.10 to 7.20, total dissolved solids averaged 27 mg/l, and sulfates averaged 12.12 mg/l.

54. The 1999 Statement of Probable Hydrologic Consequences in Vandalia Resources' application for a mining permit stated that at sampling sites SR-1, SR-2 and SR3 on Sycamore Run, concentrations of TDS, conductivity and sulfate were low, and that "this is typical of an undisturbed watershed."

55. In addition, prior to mining at the Ike Fork No. 1 site, Fola's consultant, Potesta & Associates, Inc., conducted benthic sampling in Sycamore Run at Location IF-19, which was downstream from planned Outlet 002. The conductivity at that location was 43 μ S/cm, the habitat assessment score was 130, and the WVSCI score was 84.85.

56. Discharge monitoring reports since July 2016 show that the following maximum amounts of specific conductance (Cond in μ S/cm), pH (in SU), calcium (Ca in mg/l), magnesium (Mg in mg/l), sodium (Na in mg/l), potassium (K in mg/l), sulfates (SO_4 in mg/l) and total dissolved solids (TDS in mg/l) were discharged from Outlet 002:

Table E—Outfall 002								
	Cond	pH	Ca	Mg	Na	K	SO_4	TDS
Jul-16	2500	8.45	186	194	153	15.5	1480	2150
Aug-16	2460	8.44	169	199	132	15.9	1380	2130

Sep-16	2500	8.01	182	213	150	17.6	1600	2190
Oct-16	2550	8.65	172	202	160	17.3	1500	2070
Nov-16	2380	8.85	152	177	170	16.1	1460	2010
Dec-16	2520	8.7	173	196	168	16	1530	2110
Jan-17	1940	8.9	156	161	86.1	13.5	1200	1610
Feb-17	2240	8.98	175	184	95.8	15	1310	1850
Mar-17	2120	8.7	177	192	98.2	14.4	1320	1820
Apr-17	2120	8.65	145	163	93.8	13.5	1160	1660
May-17	2100	8.9	147	173	110	13.5	1230	1720
Jun-17	2310	8.81	146	184	137	15.1	1300	2270
Jul-17	2550	8.6	178	202	84	16.4	1500	2500
Aug-17	2510	8.98	177	213	169	16.9	3130	2280
Sep-17	2430	8.54	217	245	112	17.6	2190	3040
Oct-17	2500	8.72	214	244	127	17.7	1700	2450
Nov-17	2470	8.96	185	217	108	15.4	2330	2120
Dec-17	2770	8.98	198	228	147	16.2	1820	2330

These recent conductivity levels are far above EPA's benchmark of 300 $\mu\text{S}/\text{cm}$.

57. In May 2012, May 2015, May 2016, and May 2017, Fola and/or Southeastern's consultants conducted benthic macroinvertebrate, instream habitat, and water quality sampling at six biological assessment stations (BAS) at the Ike Fork No. 1 Surface Mine. Four of those relate to Outlet 002. Station DBAS-SYR002 was located in Sycamore Run, immediately downstream from Outlet 002. Station DBAS-SYR was located in Sycamore Run, near its confluence with Lilly Fork. Station UBAS3-LF was located in Lilly Fork, upstream of its confluence with Sycamore Run. Station DBAS3-LF was located in Lilly Fork, downstream of its confluence with Sycamore Run. The results of this sampling are contained in the table below:

Table F				
Station	Date	Habitat Score	WVSCI Score	Conductivity
DBAS-SYR002	5/23/12	139	53.3	1850
	5/19/15	140	35.4	2642
	5/24/16	149	53.4	2257
	5/30/17	154	52.1	2200
DBAS-SYR	5/23/12	154	65.3	1589
	5/19/15	142	70.9	2218

	5/24/16	151	59.1	2061
	5/30/17	156	60.1	2095
UBAS3-LF	5/23/12	147	56.4	1130
	5/19/15	155	54.0	1608
	5/24/16	158	54.5	1065
	5/30/17	155	53.8	1437
DBAS3-LF	5/23/12	160	64.3	1184
	5/19/15	163	75.8	1646
	5/24/16	161	64.4	1255
	5/30/17	157	63.7	1370

58. The reported WVSCI scores at the three stations downstream from Outlet 002 were below 72 in all but one instance in 2012, 2015, 2016 and 2017. The habitat scores at all three stations were in the optimal or sub-optimal range.

59. The Ike Fork No. 1 Surface Mine is a major development activity covering a large area in the Lilly Fork watershed. The high mining intensity in that watershed and Southeastern's related discharges of ionic pollutants from Outlet 002, measured as conductivity, are causing or materially contributing to violations of water quality standards in Sycamore Run and Lily Fork.

**FIRST CLAIM FOR RELIEF
(CWA Permit Violations)**

60. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 59 above.

61. Since at least July 2016, Southeastern has discharged and continues to discharge pollutants from point sources, i.e. Outlets 001 and 004 at the Peachorchard Surface Mine No. 5, into Peachorchard Branch of Leatherwood Creek, and Outlet 002 at the Ike Fork No. 1 Surface Mine, into Sycamore Run of Lily Fork, pursuant to WV/NPDES Permit Nos. WV1017969 and WV1017951, respectively.

62. Peachorchard Branch, Leatherwood Creek, Sycamore Run, and Lily Fork are waters of the United States within the meaning of 33 U.S.C. § 1362(7).

63. Since at least January 2016, Southeastern has discharged and continues to discharge pollutants which cause ionic stress and biological impairment in Peachorchard Branch of Leatherwood Creek and Sycamore Run of Lily Fork in violation of the narrative water quality standards for biological integrity and aquatic life protection. 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

64. The narrative water quality standards for biological integrity and aquatic life protection incorporated by reference into Part C of Southeastern's WV/NPDES Permit Nos. WV1017969 and WV1017951 are "effluent standards or limitations" for purposes of Section 505(a)(1) and 505(f)(6) of the Clean Water Act because they are a condition of a permit issued under Section 402 of the Act. 33 U.S.C. §§ 1342, 1365(a)(1), 1365(f)(6).

65. Based on the WVSCI scores and measured concentrations of ionic pollutants and specific conductivity in Southeastern's discharges, and Southeastern's failures to take corrective actions to address those conditions, Plaintiffs believe and allege that Southeastern is in continuing violation of WV/NPDES Permit Nos. WV1017969 and WV1017951 and the CWA.

66. Southeastern is subject to an injunction under the CWA ordering it to cease its permit violations.

SECOND CLAIM FOR RELIEF (SMCRA Violations)

67. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 66 above.

68. Southeastern's WVSCMRA Permits S201398 and S2001298 require it to comply with performance standards of the WVSCMRA. 38 C.S.R. § 2-3.33(c).

69. Those performance standards provide that "discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards." 38 C.S.R. § 2-14.5.b.

70. West Virginia water quality standards prohibit discharges of “[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life” or that cause “significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems.” 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

71. WVSCMRA performance standards also provide that “[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside of the permit area.” 38 U.S.C. § 2-14.5. “Material damage,” at a minimum includes violations of water quality standards.

72. By violating West Virginia water quality standards for biological integrity and aquatic life protection at the Peachorchard Surface Mine No. 5 and Ike Fork No. 1 Surface Mine, Southeastern has also violated, and is continuing to violate, the performance standards incorporated as conditions in its WVSCMRA Permits S201398 and S201298.

73. Federal and State performance standards require that, “[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls.” 30 C.F.R. § 816.41(d)(1); *see also*, 38 C.S.R. § 2-14.5.c (“Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.”).

74. The violations identified herein show that Southeastern’s existing treatment methods are insufficient to meet that requirement. Thus, the performance standards require Southeastern to construct a system that will effectively treat its effluent to levels that comply

with all applicable water quality standards.

75. Each violation of Southeastern's WVSCMRA permits is a violation of SMCRA and is enforceable under the citizen suit provision of SMCRA, 30 U.S.C. § 1270(a).

76. Southeastern is subject to an injunction under SMCRA ordering it to cease its permit violations.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order:

1. Declaring that Southeastern has violated and is in continuing violation of the CWA and SMCRA;
2. Enjoining Southeastern from operating the Peachorchard Surface Mine No. 5 and Ike Fork No. 1 Surface Mine in such a manner as will result in further violations of WV/NPDES Permit Nos. WV1017969 and WV1017951 and WVSCMRA permits S201398 and S201298;
3. Ordering Southeastern to immediately comply with the effluent limitations in WV/NPDES permit WV1017969 and WV1017951;
4. Ordering Southeastern to immediately comply with the terms and conditions of WVSCMRA permit S201398 and S201298;
5. Ordering Southeastern to conduct monitoring and sampling to determine the environmental effects of its violations, to remedy and repair environmental contamination and/or degradation caused by its violations, and restore the environment to its prior uncontaminated condition;
6. Awarding Plaintiffs their attorney and expert witness fees and all other reasonable expenses incurred in pursuit of this action; and
7. Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ J. Michael Becher
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